DISTRIBUTED
MAY 5 1988

MAY 12 PAGE 16

ORIGINAL

RECEIVED
HAND DELIVERED
MAY - 5 1988
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 87-6405

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

PHILLIP D. TOMPKINS,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

Emmett B. Lewis
Robert K. Huffman
James B. Altman
Kendall W. Daines

MILLER & CHEVALIER, CHARTERED
655 Fifteenth Street, N.W.
Suite 900
Washington, D.C. 20005-5701
Telephone: (202) 626-5800

Attorneys for Petitioner

Dated: May 5, 1988

No. 87-6405

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

PHILLIP D. TOMPKINS,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, Phillip D. Tompkins, respectfully files this Reply Brief to the Respondent's Brief in Opposition.

ARGUMENTS

In urging that the issues raised by Tompkins are not certworthy, Respondent fails to recognize that Tompkins raises three important constitutional issues. First, Tompkins raises an important constitutional issue regarding the proper interpretation and application of this Court's decision in Beck v. Alabama, 477 U.S. 625 (1980). Second, contrary to Respondent's assertion that Tompkins' Batson claim raises only a factual issue, Tompkins asserts that the court below incorrectly applied the standard announced in Batson v. Kentucky, 476 U.S. 79 (1986), thereby violating Tompkins' due process rights. Third, contrary to Respondent's assertion, Tompkins' case presents an issue identical to the issue presented before this Court in Franklin v. Lynaugh, No. 5546 (certiorari granted October 9, 1987).

I. THE COURT OF APPEALS VIOLATED THIS COURT'S HOLDING IN BECK v. ALABAMA BY AFFIRMING THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF INVOLUNTARY MANSLAUGHTER AND CRIMINALLY NEGLIGENT HOMICIDE.

The court of appeals upheld the trial court's refusal to include requested jury charges for involuntary manslaughter and criminally negligent homicide on the grounds that no evidence existed in the record to warrant those charges. The court of appeals reached that conclusion by reasoning that was both circular and internally inconsistent: it found that a charge of involuntary manslaughter was unwarranted because the evidence supported only a finding of negligence, rather than the requisite recklessness, while at the same time finding that a charge of criminally negligent homicide was unwarranted because the evidence supported only a finding of recklessness, rather than the requisite negligence. See Petition for Certification at 10.

Respondent does not defend or even address the court's reasoning. Instead, Respondent attempts to shield that reasoning from review by characterizing the issue as one of state law. However, the issue of whether a defendant in a capital murder case is entitled to a jury charge for a lesser included offense is a matter of federal due process, and federal, not state, law therefore governs its resolution. Cf. Jackson v. Virginia, 443 U.S. 307 (1979) (where this Court held that a federal standard governs the determination of whether sufficient evidence exists to support a criminal conviction for purposes of federal due process); Hopper v. Evans, 456 U.S. 605, 612 (1981) (where this Court implied that a federal standard governs the determination of whether sufficient evidence exists to require a lesser included offense charge in a capital murder case). See Cordova v.

Lynaugh, No. 87-5547, slip op. at 7-8 (5th Cir. Feb. 17, 1988). (See Attachment A.)

This case raises two significant issues regarding the proper interpretation of Beck that should be resolved by this Court. First, the court of appeals misread Beck as requiring Tompkins to testify or present evidence regarding his intent before Beck would require that the jury be charged on a lesser included offense. This interpretation of Beck creates the "intolerable" result that "one constitutional right should have to be surrendered in order to assert another." Simmons v. United States, 390 U.S. 377, 394 (1968). Accord United States v. Salvucci, 448 U.S. 83, 89-90 (1980); Lefkowitz v. Cunningham, 431 U.S. 801, 806-07 (1977); Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972).

Second, this case presents an important question regarding the meaning of the "third option" required by Beck. Respondent argues that the failure to charge the jury on the lesser included offenses of involuntary manslaughter and criminally negligent homicide was "harmless" because the trial court's charge as to intentional (non-capital) murder provided the jury a "third option" between convicting Tompkins of capital murder, where a rational jury could have been unconvinced that Tompkins intended to commit murder, and acquitting Tompkins, where Tompkins had obviously committed a serious crime. But in Tompkins' case, a charge of intentional murder was not a viable "third option." Based on the evidence, it would have been impossible for the jury to convict Tompkins of intentional murder because if the jury found that Tompkins had intentionally committed murder, the evidence would have compelled it to find that the murder had occurred in the course of either a kidnapping, robbery, or attempted robbery, thereby giving rise to a verdict of

capital murder. Consequently, the trial court's failure to include a charge on either involuntary manslaughter or criminally negligent homicide effectively gave the jury no option but to convict Tompkins of capital murder or to acquit him. Because Beck requires the jury to be given a viable "third option" where there is evidence to support it, the trial court's failure to charge the jury on the requested lesser included offenses deprived Tompkins of his due process rights under Beck.

II. THE COURT OF APPEALS INCORRECTLY APPLIED THE FOURTEENTH AMENDMENT PROTECTIONS PROMULGATED IN BATSON v. KENTUCKY.

Contrary to Respondent's assertion, Tompkins has challenged the court of appeal's application of the standard of review announced by this Court in Batson v. Kentucky, 476 U.S. 79 (1986). The court of appeals did not apply the careful standard of review required to ensure that the Fourteenth Amendment protections promulgated in Batson become meaningful. The court of appeals did not weigh the trial court's credibility determinations against other evidence in the record which the court of appeals acknowledged "cast considerable doubt" on the prosecutor's explanations. Instead, the court rubber-stamped the trial court's findings.

Respondent also claims that the court of appeals correctly chose to ignore the juror comparison presented in Tompkins' supplemental brief because this evidence was not presented to the trial court. However, this was not new evidence, but merely a compilation of evidence gathered from the record which the trial court had before it during the Batson hearing. Therefore, the court of appeals erred in refusing to consider this evidence.

III. TOMPKINS SHOULD BE HELD PENDING THIS COURT'S DETERMINATION OF FRANKLIN v. LYNAUGH.

Respondent argues that Tompkins does not present the same issue as Franklin v. Lynaugh, No. 87-5546 (certiorari granted October 9, 1987). However, both counsel for Franklin, on appeal, and counsel for Tompkins in a pre-trial Motion to Quash, challenged the constitutionality of Texas' sentencing procedure for capital murder on the grounds that the procedure does not permit the jury to consider mitigating evidence if that evidence is not directly relevant to one of the two statutory sentencing questions. Counsel for Tompkins argued:

> In the Jurek case, the Court stated that question 2 can be interpreted to allow mitigating evidence to come forward, but there's nothing to guide the jury in each individual case . . . on how to handle mitigating circumstances . . . . [T]he jury is asked under their oaths to follow the law, and there's no framework in the issues to allow mitigating circumstances or mercy.

R. Vol. IV at 23-24. See also R. Vol. IV at 11, 16, 27, 28, 29 (Attachment B). It is true that Tompkins' counsel did not request jury instructions as did Franklin's counsel, but that merely goes to the form of the challenge, not the substance. (It would have been futile for Tompkins to request jury instructions regarding mitigating evidence when his previous motion challenging the identical defect had been denied.) Therefore, Tompkins asks this Court to hold the petition on this issue until the Court decides Franklin and to return this case to the Texas courts for further consideration in light of this Court's decision in Franklin.

CONCLUSION

WHEREFORE, for the foregoing reasons, Tompkins respectfully requests this Court to issue a writ of certiorari to the Texas Court of Criminal Appeals. In the

alternative, the Court may wish to defer the disposition of the petition pending its decision in Franklin v. Lynaugh, No. 87-5546 (certiorari granted October 9, 1987).

Respectfully submitted,

Emmett B. Lewis
Robert K. Huffman
James B. Altman
Kendall W. Daines

MILLER & CHEVALIER, CHARTERED
655 Fifteenth Street, N.W.
Suite 900
Washington, D.C. 20005-5701
Telephone: (202) 626-5800

Attorneys for Petitioner

Dated: May 5, 1988

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION and ATTACHMENTS to be served upon the State of Texas on May 5, 1988, by mailing a copy thereof, first-class postage prepaid, to:

Charles A. Palmer, Esq.
Assistant Attorney General
P. O. Box 12548
Capital Station
Austin, Texas 78711-2548

Emmett B. Lewis

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-5547

GEORGE CORDOVA,

Petitioner-Appellant,

versus

JAMES A. LYNAUGH, Director,
Texas Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the Western District of Texas

(Febtuary 17, 1988)

Before REAVLEY, GARWOOD and HIGGINBOTHAM, Circuit Judges.

REAVLEY, Circuit Judge:

George Cordova, sentenced to death by a Texas court for the murder-robbery of Joey Hernandez, appeals the denial of the writ of habeas corpus. Our examination of the record reveals that the state trial court violated Cordova's due process rights by failing to instruct on the lesser included offense of murder. We

reverse and remand with directions to conditionally grant the writ.

I.

Jose (Joey) Hernandez and Cynthia West in the early morning hours of August 4, 1979 "parked" in a small parking lot in Espada Park in San Antonio, Texas. As Hernandez and West talked in the car, George Cordova approached and asked for oil. Hernandez replied that he did not have any and Cordova left. At around 2 a.m., Cordova returned with Manuel Villanueva and two other men.

When Hernandez reached to start the car, he was struck in the face by one of the men. The car door was opened and Cordova and Villanueva started beating Hernandez. West saw Cordova strike Hernandez with a tire iron and Villanueva attack him with a knife. Cordova took West's wrist and forced her to run into a wooded area of the park. Along the way, Cordova threatened to do to her what he did to Hernandez. West was then forced to the ground face down and Cordova stuck the tire iron next to her face and again threatened her. Cordova made West stand up and run further into the woods, where he undressed her, taking her watch and a necklace. She was raped by Cordova, Villanueva, and a third man. After the attackers departed, West dressed and ran back to the parking lot. There, she discovered that the car was gone and Hernandez was lying dead in a pool of blood.

When Villanueva was arrested shortly after the crime, he had

a bloodied knife in his possession. Leon Springs testified that Villanueva returned home on August 4 with a bloody shirt. Springs turned over to police some 8-track tapes which belonged to Hernandez, together with Hernandez's watch and empty wallet. Springs testified that Villanueva had given him the property. Two cassette boxes, identified as belonging to Hernandez, were recovered from Villanueva's sister who had received them from Villanueva. West's watch was also recovered from Villanueva's house. Hernandez's car was discovered on a street about 2 1/2 blocks from Villanueva's house, and approximately the same distance from the house where Cordova lived.

Cordova was indicted for capital murder. Specifically, he was charged with intentionally causing the death of Hernandez by stabbing him with a knife while in the course of committing and attempting to commit a robbery of Hernandez. Tex. Penal Code Ann. § 19.03(a)(2) (Vernon 1974).

The testimony at trial consisted mainly of West's account, as related above, of the events of August 4. She positively identified Cordova and Villanueva. Other testimony established where the car and other property was found. Besides West's identification, the only other evidence connecting Cordova to the criminal activity was Leon Springs' testimony that he was at the Villanueva house on the evening of August 3 when he saw Cordova come and pick up Villanueva and Villanueva's sister's testimony

that she saw Cordova with Villanueva on August 6. There was no physical evidence linking Cordova to the crime and no stolen property was found on Cordova or in his house.

The medical evidence introduced showed that Hernandez had wounds on his face that could have been caused by a tire iron. However, the cause of death was a stab wound to the back of the neck.

After the close of the evidence, Cordova's counsel objected to the failure to include an instruction on the lesser included offense of murder. The trial court overruled the objection.

The jury found Cordova guilty of capital murder. After presentation of evidence at the punishment stage, the jury answered "yes" to both special issues submitted to it. See Tex. Crim. Proc. Code Ann. art. 37.071(b) (Vernon 1981 & Supp. 1987). Cordova was then sentenced to death. Tex. Crim. Proc. Code Ann. art. 37.071(c)-(e).

The Texas Court of Criminal Appeals affirmed Cordova's conviction and sentence. Cordova v. State, 698 S.W.2d 107, 110-11 (Tex. Crim. App. 1985), cert. denied, 106 S.Ct. 1942 (1986). In addressing Cordova's claim that the trial court erred in refusing to instruct on the lesser included offense, the court stated:

> In determining whether a defendant is entitled to a charge on a lesser included offense we will consider all the evidence presented at trial. [In doing so], this Court [applies a]

> two-prong test. . . . The first prong requires that the lesser included offense must be included within the proof necessary to establish the offense charged. Secondly, there must be some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense.
>
> The defendant did not testify nor did he offer any testimony which might reasonably raise any lesser included offenses. The fact that the State in proving capital murder may also have proved a lesser offense does not entitle a defendant to a charge on the lesser offense. There is no evidence in the record that the appellant was guilty of only a lesser included offense.

Id. at 113 (citations omitted).

After exhausting his state court remedies, Cordova brought a habeas action raising a number of issues. The district court denied relief and Cordova appeals. We need only address the issue of failure to instruct on the lesser included offense of murder.[1]

II.

A.

In Beck v. Alabama, 447 U.S. 625, 638, 100 S.Ct. 2382, 2390,

[1] Our order of retrial moots all of Cordova's other claims except for his claim that the evidence was insufficient to show that the murder was during the course of robbery. A finding of insufficiency of the evidence would implicate double jeopardy concerns. See, e.g., United States v. Sneed, 705 F.2d 745, 747-49 (5th Cir. 1983). However, as our discussion on the lesser included offense makes clear, see infra § II (C), the evidence was sufficient to prove that the murder was in the course of a robbery of Hernandez.

65 L.E.2d 392 (1980), the Supreme Court invalidated, on due process grounds, a provision of the Alabama death penalty statute that precluded the jury from being instructed on a lesser included noncapital offense. As explained in Hopper v. Evans, 456 U.S. 605, 610, 102 S.Ct. 2049, 2052, 72 L.Ed.2d 367 (1982), Beck stands for the proposition that "the jury [in a capital case] must be permitted to consider a verdict of guilt of a noncapital offense 'in every case' in which 'the evidence would have supported such a verdict.'" Although Beck, strictly speaking, "holds only that a state cannot impose a blanket ban on the giving of lesser-included-offense instructions in a capital case," Reddix v. Thigpen, 805 F.2d 506, 511 (5th Cir. 1986), we have consistently held that Beck's holding applies when the state trial court refuses a lesser included offense instruction. See Reddix, 805 F.2d at 511-12 (applying Beck but finding no violation because evidence did not support lesser included offense); Bell v. Watkins, 692 F.2d 999, 1004-05 (5th Cir. 1982), cert. denied, 464 U.S. 843 (1983) (same).[2]

The federal standard "is that a lesser included offense instruction should be given 'if the evidence would permit a jury

[2] A plain reading of Beck and Hopper inexorably leads to the same conclusion. If due process is violated because a jury cannot consider a lesser included offense that the "evidence would have supported," Beck, 447 U.S. at 627, 100 S.Ct. at 2384, the source of that refusal, whether by operation of state law or refusal by the state trial court judge, is immaterial.

rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater.'" Hopper, 456 U.S. at 612, 102 S.Ct. at 2053 (quoting Keeble v. United States, 412 U.S. 205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973)). As the Supreme Court noted, the states have varied "in their descriptions of the quantum of proof necessary to give rise to a right to a lesser included instruction . . . ." Beck, 447 U.S. at 636 n.12, 100 S.Ct. at 2389 n.12. Without denigrating any state's standard, including Texas',[3] we conclude that the federal standard -- a lesser included instruction must be given when a jury could rationally convict of the lesser offense and acquit on the greater offense -- is equivalent to the Beck standard that a lesser included instruction must be given when the evidence would have supported such a verdict. In other words, due process and the Eighth Amendment require that, in a capital case, the jury must be allowed to consider a lesser included noncapital offense

[3] As explained in Cordova, 698 S.W.2d at 113, Texas courts apply a two prong test for lesser included offenses. The first prong, "that the lesser included offense must be included within the proof necessary to establish the offense charged," is, apparently, nothing more than a requirement that the lesser included offense really be a lesser included offense. The second prong that "there must be some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense," seems very similar to the federal standard.

However, we are not concerned about the Texas standard or its possible misapplication to the facts here. Instead, we only address the issue of whether due process required that Cordova's jury be given a lesser included instruction.

if the jury could rationally acquit on the capital crime and convict for the noncapital crime.

That we equate the federal standard with the Beck requirement is not momentous. Both Beck and Hopper talk of the federal standard and, at least impliedly, adopt it. See Beck, 447 U.S. at 635-37, 100 S.Ct. at 2388-89; Hopper, 456 U.S. at 611-12; 102 S.Ct. at 2053. Similarly, our cases have also used the federal standard in the Beck situation. Bell, 692 F.2d at 1004-05; Reddix, 805 F.2d at 512. Beck rested on the proposition that when "the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." 447 U.S. at 637, 100 S.Ct. at 2389. The federal standard, by looking at what a rational juror could do, given the evidence, directly addresses that risk. Finally, the attorney for Texas conceded at oral argument that the federal standard was proper in the Beck situation.

The issue here is whether a rational juror, given all the facts, could have acquitted Cordova of capital murder and convicted him of a lesser included offense. An understanding of the laws of Texas is necessary to answer that issue.

B.

Cordova was indicted for, and convicted of, capital murder. Specifically, the indictment charged that Cordova murdered Hernandez during the course of robbery of Hernandez. The capital murder statute in Texas, Tex. Crim. Code Ann. § 19.03 (Vernon 1974) provides, in pertinent part:

> (a) a person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:
>
> . . .
>
> (2) the person intentionally commits the murder in the course of committing or attempting to commit . . . robbery . . . .[4]

[4] The statute, at the time of Cordova's crime, read in full:

> (a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:
>
> (1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;
> (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;
> (3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;
> (4) the person commits the murder while escaping or attempting to escape from a penal institution; or

Section 19.02(a)(1) of the Texas Penal Code, defines murder: "A person commits an offense if he: (1) intentionally or knowingly causes the death of an individual."

That the murder must have been committed "in the course of committing . . . robbery," § 19.03(a)(2), means that the conduct

> (5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.
>
> (b) An offense under this section is a capital felony.
>
> (c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

Tex. Crim. Code Ann. § 19.03 (Vernon 1974).

The statute was later amended to change "aggravated rape" to "aggravated sexual assault" in subsection (a)(2) and to add to section (a):

> (6) the person murders more than one person:
>
> (A) during the same criminal transaction; or
> (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.

Tex. Crim. Code Ann. § 19.03 (Vernon Supp. 1988).

We note that the indictment did not charge Cordova with the murder of Hernandez during the course of aggravated rape or robbery of West. Instead, the only allegation that made the murder capital was the robbery of Hernandez.

causing the death occurred "in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of [the] . . . robbery," Fierro v. State, 706 S.W.2d 310, 313 (Tex. Crim. App. 1986) (quoting Riles v. State, 595 S.W.2d 858, 862 (Tex. Crim. App. 1980)). If a robbery is committed as an "afterthought" and unrelated to the murder, it is simple murder and not capital murder. O'Pry v. State, 642 S.W.2d 748, 762 (Tex. Crim. App. 1982). In other words, as charged by the indictment, the state had to prove that Cordova intentionally[5] caused the death of Hernandez, in an attempt to commit, during the commission of, or in immediate flight after the attempt or commission of robbery of Hernandez.

The law of parties applies to the guilt phase of a capital murder trial. Cordova, 698 S.W.2d at 111; English v. State, 592 S.W.2d 949, 955 (Tex. Crim. App.), cert. denied, 449 U.S. 891 (1980); see Tex. Penal Code Ann. §§ 7.01, 7.02 (Vernon 1974) (law of parties). The Texas Court of Criminal Appeals explained the law of parties in Cordova, 698 S.W.2d at 111 (citations omitted):

> Evidence is sufficient to convict the

[5] Although murder is defined in Tex. Penal Code Ann. § 19.02(a)(1) as "knowingly or intentionally" causing the death, § 19.03(a)(2) specifies that the murder must be intentional in these circumstances. Intentional is the requisite mental state; murder committed knowingly during the course of robbery is not capital murder under § 19.03(a)(2). Demouchette v. State, 731 S.W.2d 75, 80 (Tex. Crim. App. 1986), cert. denied, 107 S.Ct. 3197 (1987).

> defendant under the law of parties where he is physically present at the commission of the offense, and encourages the commission of the offense either by words or other agreement. The agreement, if any, must be before or contemporaneous with the criminal event. To convict someone as a party to an offense, the evidence must show that at the time of the offense the parties were acting together, each doing some part of the execution of the common purpose. In determining whether the accused participated as a party, the court may look to events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act.

As the Court of Criminal Appeals has stressed, the agreement must be prior to the act. See Randolph v. State, 656 S.W.2d 475, 477 (Tex. Crim. App. 1983) (subsequent agreement to fabricate a story with no evidence of prior agreement was insufficient for murder conviction).

Finally, we conclude with relevant Texas law by noting that murder is a lesser included offense of capital murder. See Tex. Penal Code Ann. § 19.03(c) (If the jury does not find the defendant guilty of capital murder, it may convict him "of murder or any other lesser included offense.").

c.

In order to prove capital murder, the state had to show that Cordova intentionally murdered Hernandez, either personally or as a party, while in the course of robbing Hernandez, either personally or as a party. The specific issue is whether a

rational jury could have found that Cordova murdered Hernandez but that it was not in the course of the robbery. If so, the trial court violated due process by not instructing on the lesser included offense of murder.

A brief review of the evidence shows that Cordova and Villanueva approached and attacked Hernandez. Cordova then took West off into the woods where he raped her. Cordova went off while two other men raped West. He then returned and everybody left. West's own testimony proved that Cordova participated in her rape and the murder of Hernandez. The proof of Cordova's participation in the robbery of Hernandez is only circumstantial and far from certain. Hernandez was definitely robbed: his car was found abandoned and his watch and wallet and other items were given to police by people who said Villanueva gave the items to them. But the sequence of events tends to show that Cordova did not personally commit the robbery of Hernandez. Cordova was with West most of the time. West testified that when he left her, Cordova went in the direction of the cars on the dirt road. She did not testify that he went in the direction of the parking lot where Hernandez lay.

The state contends that Cordova is guilty as a party. They point to him as the leader of the gang, since he did the talking, and the fact that he robbed West. The state concludes that this shows he had a prior agreement to rob Hernandez. We agree that

the jury could infer that Cordova had a prior agreement to rob Hernandez.[6] The problem is that the jury could reject that inference. Given the lack of evidence of Cordova's personal participation in the robbery, as well as the fact that none of the stolen items were traced to Cordova,[7] a rational jury could conclude that Cordova did not have a prior agreement to rob Hernandez.

The state points to the fact that Cordova robbed West to show his larcenous intent. The state also argues that the evidence is conclusive on the robbery because there is no other reason to attack Hernandez. We disagree. The fact that Cordova robbed West simply does not establish conclusively that he had the same intent to rob Hernandez. Indeed, Cordova let West keep her high school ring, indicating that he was not all that interested in robbery. As for the purpose of the attack, Cordova seemed most interested in raping West. It is at least arguable that his purpose throughout was to rape West, not to rob Hernandez.

Given all of the evidence, especially Cordova's lack of personal participation in the robbery of Hernandez and the fact

[6] See supra n.1.

[7] Hernandez's car was found equi-distant between Cordova's and Villaneuva's houses in a heavily residential area. That evidence does not necessarily prove that Cordova stole it.

that no stolen property was traced to him, we conclude that a rational jury could have concluded that Cordova had no "prior agreement or common purpose," Cordova, 698 S.W.2d at 112, to rob Hernandez. It could then have acquitted Cordova of capital murder, and found him guilty of murder. Since the trial court refused to instruct on the lesser included offense of murder, and the "evidence would have supported such a verdict," Cordova's due process rights were violated. Hopper, 456 U.S. at 610, 102 S.Ct. at 2052.

To recapitulate, the evidence would support the jury in finding either that Cordova planned the robbery of Hernandez or that he did not so plan. The proof of Cordova's agreement to rob Hernandez, unlike the proof of his intent to kill Hernandez, was circumstantial and ambiguous. If properly instructed, therefore, the jury could have found Cordova guilty of either simple murder or capital murder. Without the instruction on the lesser included offense of murder, the choice given to the jury in this trial was between conviction for capital murder and acquittal. The pressure to avoid acquitting so reprehensible an actor, driving the jury toward conviction for (robbery) capital murder, registers the due process and Eighth Amendment violations.[8]

[8] We note that the type of constitutional error here can never be harmless. See Hopper, 456 U.S. at 610, 102 S.Ct. at 2052 (Jury in capital case "must be permitted to consider a verdict of guilt of a noncapital offense 'in every case' in which 'the

IV.

The judgment of the trial court denying the writ is reversed. We remand and instruct the trial court to grant the writ conditioned upon the retrial of Cordova by the State of Texas.

REVERSED and REMANDED.

evidence would have supported such a verdict.'") (emphasis added). By the very nature of the error, that the jury could have rationally convicted of a less than capital offense but was not allowed to consider the offense by the jury instructions, precludes any harmless error analysis.

The nature of the initial inquiry itself is very similar to a harmless error anaylsis. If the instruction was refused, but the jury could not rationally convict on the lesser offense, then the alleged error would be harmless. In other words, the harm is subsumed in the test itself.

ATTACHMENT 3

APPELLATE COURT NO. _____

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

AT AUSTIN

PHILLIP DANIEL TOMPKINS,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM THE 230TH DISTRICT COURT OF HARRIS COUNTY, TEXAS. Judge Joe Kegans, Presiding

---

STATEMENT OF FACTS

FILED
RAY HARDY
District Clerk
AUG 0 4 1981
Time _____
Harris County, Texas
By _____ Deputy

SHARON COOK
Certified Court Reporter
230th District Court
Harris County, Texas

ATTACHMENT 8

APPELLATE COURT NO. _____

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

AT AUSTIN

PHILLIP DANIEL TOMPKINS,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM THE 230TH DISTRICT COURT OF HARRIS COUNTY, TEXAS. Judge Joe Kegans, Presiding

---

STATEMENT OF FACTS

FILED
RAY HARDY
District Clerk
AUG 0 4 1981
Time _____
Harris County, Texas
By _____ Deputy

SHARON COOK
Certified Court Reporter
230th District Court
Harris County, Texas

Quash the indictment and the Motion to Hold Article 37.07-1 of the Texas Code of Criminal Procedure unconstitutional because they are basically the same comment that would apply to both motions in addition to what is presented in the motion itself.

THE COURT: All right, sir.

MR. DOWELL: Your Honor, basically, we would ask that the provision of Article of 37.07-1 of the Code of Criminal Procedure be held unconstitutional because it is mandatory in nature. Mandatory statutes have been held to be violative of the Constitution in Furman versus Georgia, 408 U.S. 283-1972 and the United States Supreme Court case and Woodson versus North Carolina, 428 U.S. 280-1976, Supreme Court case as well as Roberts versus Louisiana, 428 U.S. 325-1976 case.

Judge Odom in the Texas Court of Criminal Appeals in a dissenting opinion in the state case holding the provision constitutional noted that the trial Court is required to submit specific issues to the jury. The jury is required to make determinations based on those special issues. If answered affirmatively, the

trial Court is required to assess the death penalty. It is clear that the statute is specifically mandatory by the specific mandatory terminology that is used and the total lack of permissive language that is omitted from the statute.

We cannot presume that the jury will violate their oath in order to grant mercy in a particular case. The case of Furman and Woodson and Roberts, which we quoted, illustrate that the mandatory sentencing in the death penalty cases are violated by the Constitution because they are unduly harsh in the nature and violate the Eighth and Fourteenth Amendments, and forces the jury's evasion of the issues submitted, in the event the jury finds by acquittal, or a lesser included offense, is a proper punishment. The Texas statute differs materially from the Louisiana statute, which is rejected in Roberts versus Louisiana, only in the fact that the jury is required to answer yes to specific questions. The Louisiana statute was totally rejected as being mandatory, and, of course, our statute requires that in order for a jury to show mercy, if they are of the

opinion that mercy is called for and to the extent they answer question No. 2 yes, they must violate their oath in order to grant mercy in the case.

In other words, if they think mercy is required and they answer both special issues yes, they have no provision in our statute to bring that to the attention of the trial Court. The perplexitive nature of such is that the Supreme Court is not sure what kind of statute we have. The plurality opinion by Justices Stewart, Stevens, and Powell felt that the statute was a discretionary one, whereas the concurring opinion of Justices Burger, Rehnquist, and Justice White felt it was a mandatory statute which shows in and of itself there is some unusual nature to the Texas statute. The unbounded discretion that is referred to in the motion as one of the major factors to set aside the indictment was spoken to initially in the Furman case. It says that the Eighth and Fourteenth Amendments could not tolerate the infliction of the death penalty under a legal system that permitted the death penalty to be so wantonly and freakishly applied. The sentencing body in Texas, the jury must be suitably directed

and limited so as to minimize, at best, the wholly arbitrary and capricious decision.

The Jurek case was decided in relation to four other cases. At the same time, the Supreme Court decided Gregg versus Georgia, Proffitt versus Florida, which were two cases that were affirmed, Jurek and that the two cases that were reversed, Woodson versus North Carolina and Roberts versus Louisiana.

Now, Jurek cites with approval Gregg versus Georgia and Proffitt versus Florida, but the Texas statute cannot be shown to have any relationship to the Georgia statute that was affirmed and the Florida statute that was shown to be constitutionally valid. Under the Georgia law, the judge sumbits to the jury any mitigating factors or aggravating circumstances, along with a list of ten statutorily defined aggravated circumstances. This implies an actual instruction in the charge on these circumstances, mitigating and aggravating. The jury on punishment considers prior criminal convictions, pleas, or the absence of those. Only those aggravating circumstances that are made known to the defendant prior to the trial can be admitted, and the jury can

recommend mercy, regardless of the finding of aggravating circumstances. There is no prediction of future conduct attempted by the Georgia statute, and the Court is, by statute, obligated to submit any lesser included offenses that can be supported by any evidence that is submitted during the trial. By statute, the defendant is granted substantial latitude in the types of evidence he can show regarding mitigation, which is unlike the Texas statute. The jury must specifically find an aggravated circumstance and specifically state in its finding one of the ten aggravating circumstances as defined by statute, and after they have found that, they must specifically say that the death penalty should be assessed, and with those findings the jury makes in writing, it affords the appellate court some method of meaningful review that is not allowed by the Texas statute.

In an effort to assure the death penalty statute is properly applied, the judge -- the trial judge -- is submitted a questionnaire, and in that questionnaire, he must go through every facet of the trial to show the appellete court that there has been no arbitrary or

capricious action on the part of the jury and that there has been no excessiveness or disproportionate treatment to the defendant. The Court must also submit to the appellate court a statement showing that the guilt of the defendant is such that it forecloses all doubt as to his innocence.

The Georgia Supreme Court, in its review of the case on appeal, in its decision, is obligated to make reference to other cases of similar nature, the rulings of those cases as it applies to the case at bar. The reason they must show this is to show that there is no disproportionate treatment throughout the state of Georgia with reference to a particular fact situation. This is also not required under the Texas statute.

The Florida law allows a jury to be waived. It lists eight aggravating circumstances and eight mitigating circumstances submitted to the jury, and the jury can recommend mercy regardless of the aggravating circumstances in Florida. The jury is obligated, under statute, to weigh the aggravating circumstances against the mitigating circumstances, which is not done

in Texas procedure. And then they vote, by the majority, and they submit their findings to the Court. It is advisory in nature, requesting the Court for a pre-sentence investigation, and they can do a number of other things before finding a death penalty is an appropriate sentence. Also, the Florida law does not make any attempt to predict future conduct.

The Texas law -- the special issues the Court is very familiar with -- asks whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; whether there is a probability that the defendant would commit criminal acts of violence that will constitute a continuing threat to society, and where appropriate, the issue of provocation is submitted. It appears that the first two questions, the first question and the third question submitted to the jury, are questions that must be faced prior to getting into the punishment phase, and the fact that they had faced the issue of the intentional killing of a person, and they are faced on Special Issue

No. 1 with finding the act was deliberate, are just asking for confusion within 37.07-1.

Now, the special issues that are required in 37.07-1 are strictly factual determinations, and does not allow the jury to consider mercy with any kind of framework. Now, if the Court determines that the statute under which we are considering here, 37.07-1, the mandatory statute, there is absolutely no guidance not to violate Furman, Gregg, and Woodson, and if the Court finds it is discretionary in nature, then there is no adequate guidance on how to answer special issues in the context of mitigating circumstances. This also would violate Furman and Gregg.

Guidance with respect to 37.07-1 is totally lax in three particulars. Initially, it is lacking with respect to vagueness in 37.07-1. It is lacking in the method by which mitigation and mercy is considered. And it is also lacking in the essence of the way the burden of proof is utilized on the finding of a no answer to one of the jury issues. With respect to vagueness, as the Court is well aware, vagueness is a term that is used to show there is no ascertainable

standard that is presented to a trier of the fact. Terms of the statute, terms such as "deliberately," as I said before, is confusing with respect to their already finding at that point an intentional killing and the 1975 Court of Criminal Appeals case, Blansett versus State, can illustrate this point clearly in that they found no on Special Issue No. 1, and the Court of Criminal Appeals in that instance felt that the fact they found no showed that they wanted some lesser punishment, but that is not within the framework of the statute. The statute does not intimate that the jury can show mercy by answering one special issue, like the first special issue, no.

The term "probability" has caused everyone problems, including the Supreme Court of the United States, because, in essence, it asks a jury to find a probability beyond a reasonable doubt. The term "probability" can mean a number of things. It can mean, in a mathematical sense, can be any chance, however small. Of course, this does not comport with the beyond-a-reasonable-doubt standard, and it also gives such an enormous leeway to differing

definitions of the term that that cannot possibly be what the legislature meant. If the term "probability" means greater than fifty percent, then we are asking the jury to find a probability or a preponderance of the evidence beyond a reasonable doubt, and, of course, the legislature would not have asked them to do that. If probability means a high probability, then you are asking the jury to find what amounts to something beyond a reasonable doubt, and no one, not even the psychiatrists who testify for the State on a regular basis, would testify that future conduct can be predicted beyond a reasonable doubt.

Though raised in Jurek, vagueness was passed over pretty much by the Court. Justice Stevens said it is not easy to predict future behavior, and in illustrating this fact in saying it could be done, however, the Court referred to how the issues of granting bail or granting parole. Of course, as the Court might well recognize, initially granting bail and parole are inconsequential compared to the punishment of the death penalty. And, also, the Court overlooked completely the fact that the

trial judges on a daily basis are confronted with issues of bail, and that is an issue that they are qualified to handle. Parole matters are in the hands of the parole board, and they handle both matters on a daily basis, and they are, supposedly, qualified to handle that. But in the case at bar, or any capital murder case where a jury is making this decision, you are most probably dealing with people who have never been involved in sentencing procedures and are not qualified to answer this question. The Court of Criminal Appeals in Granviel versus State, 552 SW2d., 107, points out the impossibility of defining probability. In that, they define probability as a number of things, including the likelihood, and when you look up the definition of the terms, those terms are used as a definition of probability. None of the suggested definitions require a conclusion -- an issue is more likely to occur than not occur.

The statute fails to state specifically what dangerousness means; what amount of dangerousness is necessary in order to find affirmatively on the special issues. King versus State, 553 SW2d., 105, held the jurors were

supposed to know the meanings of these terms. They were common sense terms, utilized in special issues, and defining instructions are not necessary.

Battie versus State, 551 SW2d., 401, holds in part it is not error to prohibit actually granting the jury the definition as to these terms, but then the statute goes on to other terms, such as criminal acts of violence, continuing threat to society, and I doubt that it would be difficult to state that these terms have no common sense meanings. They are hopelessly vague, and looking at several examples, a slap to the face, would that be criminal? Is the Court asking the jurors to find offenses that are assaultive or more serious assaultive offenses? Does that term apply to damage to property? And what does violent mean? The vagueness of those terms -- the threat to society. What society? Are they talking about the prison society or the civilian society? A person who is granted life in the penitentiary, after finding no on the special issues, would he be most likely to be in prison for quite a while? Under that, is he going to be a threat to the prison society, or

at some later time, is he going to be a threat to civilian society? At what point in time is the jury guided to ascertain what year he might be a threat to society in the future?

Of great importance to the Supreme Court's opinion in Gregg was the Georgia Supreme Court's active role in policing some statutes, and the Georgia Supreme Court held unconstitutional part of their own statute that required a submission to the jury of a substantial history of serious assaultive criminal acts, criminal convictions. Now, this particular statement, substantial history of assaultive criminal acts, is just as vague as the Texas statute, and the only difference between the Georgia statute and the Texas statute is that this was the only part of the Georgia statute that was vague. The Texas statute is entirely vague.

As Professor Dix of the University of Texas law school pointed out in his article on the death penalty statute, Livingston versus State, 542 SW2d., 655, provided an example of criminal acts of violence. There, the transcript reflected that there was evidence that the defendant had been convicted of theft, burglary,

and the case he had just been convicted on, robbery/murder. The jury requested a definition for criminal acts of violence. Now, the Court submitted to them a statement that they should give it the ordinary meaning. The jury returned a short while later with a yes answer, which clearly shows that at the jury had the understanding that criminal acts of violence would include such things as burglary or theft. Ironically, in Jurek, Justice White and Justice Rehnquist stated with plurality opinion, Powell and Stevens, that the Texas statute in its terms had a common sense meaning and a criminal jury should be able to understand it. But the ironic part of that is the plurality opinion never at any time can use that terminology nor is the statement a common sense, core meaning and one that can be understood itself.

It is interesting to note that the jury should be able to understand the meaning of the words rather than the use of more definite terms or mandatory terms such as would or will understand. In other words, the Supreme Court is not totally of the opinion these terms could be understood. The failure of Article 37.07-1

to guide on the issue of mercy is also an issue. As Justice Stevens stated in Jurek, the Texas statute does not explicitly speak to the mitigating circumstances. It directs only that the jury answer three questions -- two questions must be answered, one is one more if it is raised by the evidence. In the Jurek case, the Court stated that question 2 can be interpreted to allow mitigating evidence to come forward, but there's nothing to guide the jury in each individual case, as in the case at bar, on how to handle mitigating circumstances. As an example, the Supreme Court, in a very unusual move, reached down to the case of Smith versus State, which was not before the Court at that time, and showed with approval how mitigating circumstances can come forth in a case. Unfortunately, Smith versus State had no mitigating circumstances, so it was a rather unusual illustration. In that case, it was a filling station robbery that a codefendant did the actual killing, and the Supreme Court relied very heavily, as the Court of Criminal Appeals, on the fact that the defendant did some time on probation for a marijuana conviction, and had --

and had failed to be able to secure adequate employment. Now, if those factors are to be considered under 37.07-1, the statute is immensely vague. These, obviously, were not the type of matters that should be considered by the jury on the issue so great as the death penalty. The reason that the Court found no mitigating circumstances in Smith or any other case that they looked at from Texas is that in 37.07-1, the way the questions are asked are very negative in nature, and the jury is asked under their oaths to follow the law, and there's no framework in the issues to allow mitigating circumstances or mercy. As a mater of fact, in the case of Euniz versus State, 573 SW2d., 792, which cites Burns versus State, it says that circumstances of the offense for which the defendant was found guilty would be sufficient to find affirmatively to question No. 2. In Duffey versus State, 567 SW2d., 197, evidence of non-assaultive matters were found to be probative, but not dispositive as to question 2, but there's no way to know whether non-assaultive cases can be considered by the jury or how to handle the matters when they are confronted with this type of evidence.

There's also no guidance for the trier of fact in weighing the evidence and answering the special issues, such as in Gregg, where the Supreme Court stated an experienced trial judge daily faces the difficult task of imposing sentence and has a vital need of accurate information about the defendant and the crimes that have been committed in order to impose a rational sentence in a typical criminal case. Accurate sentencing information is an indispensable prerequisite to a reasonable determination as to whether a defendant shall live or die by a jury of people who never before have made a sentencing decision. They went on to say that since the members of the jury have little, if any, previous experience in sentencing in their own life, they have to deal with the information they are given. This type of unguided discretion is absolutely essential and was prohibited in Woodson versus North Carolina and Roberts versus Louisiana, and Justice Stewart, who wrote the plurality opinion in Jurek, also wrote in Woodson and insisted on mitigating evidence. This later was upheld in Locket versus Ohio, and the Court of Criminal

Appeals has referred generally to Locket, but there is no guidance in the individual case as to how the jury is to handle mitigation of evidence, in light of specific standards set out by Special Issue No. 2. Actually, the statute contemplates a jury does more than answer the questions asked them. And the Supreme Court has never determined the issue of vagueness and has never addressed the adversary of the standard of determining whether the State has established the requiisite of probability, whatever that term might mean. Mere technical opportunity, or the fact in one case a jury was given mitigating evidence and in some way considered it, the technical opportunity to do so is not constitutionally sufficient.

The focus and range of the jury's inquiry is also too narrow. Juries are merely asked to answer special issues, regardless of the effect. This is referred to in Burns versus State, 556 SW2d., 270. The statute creates sufficient arbitrary application if the jury in some way wants to grant mercy, but they find they would violate their own oath.

If Burns is read to limit any

questioning as to the effect of their deliberations as to the death penalty, with respect to the entire trial process, then that would not allow us to voir dire the jury on this issue, and that would be in violation of Gregg, Woodson, Proffitt, and Roberts.

The Court has allowed questioning of experts in the language of the special issues, but the special issues do not let the attorneys present mitigating circumstances because of the language of the special issues. It does not fit within the framework of those issues, and it is somewhat meaningless to present it. The Texas statute also allows or is so vague in the sense that there is some mitigating evidence that can also be used as aggravating circumstances, such as the issue of intoxication. Intoxication may show mitigation or it might show a particular defendant is more highly susceptible to repeat an offense while intoxicated. It shows in the case of Whitmore versus State, which is docket No. 52-325 of the Court of Criminal Appeals, that the Court requires the Defense to show that intoxication reached the level of temporary insanity before it can be utilized as a

mitigating circumstance. The same type of atmosphere was in Granviel versus State, where prior psychological problems must have been raised in the defense in order to have it used as a mitigating circumstance. This is in violation directly of Locket and Gregg versus Georgia.

The jury is also not instructed how to balance evidence that might mitigate, which also suggests a continuing dangerousness within the vagueness of question No. 2. In Burns versus State, there is an illustration of this paradox by allowing defense counsel to argue against the death penalty and the effect of the jury's answers, despite each juror's oath to the contrary. In Gholson versus State, 542 SW2d., 393, in that case it allowed the prosecutor to argue to the jury to disregard all of the motions and they must answer the question yes if the State proved their case. The jury is not given any authority or guidance where aggravating circumstances are shown, but the jury believes the death penalty should not be assessed. The jury is told by the statute to ignore evidence. The entire legal system of charging, adjudicating

and viewing the death penalty procedure is standardless.

Furthermore, Article 37.07-1 confuses the burden of proof. It seems to imply that the jury can easily get the implication that the Defense must show by some standard, most likely beyond a reasonable doubt, that no should be the appropriate answer to a particular issue. Under those circumstances, it would be violative of Locket and other cases cited before. Additionally, 37.07-1 goes well beyond what we have in a normal case, even a normal murder case, other than a capital case in allowing the State to introduce evidence of non-adjudicated offenses, which might "tend to shed some light to the jury."

Your Honor, for all of these reasons, we would ask the Court to hold 37.07-1 unconstitutional and to quash the indictment brought in this particular case.

THE COURT: Sir, now, you have an additional Motion to Quash, Mr. Dowell. You have the instrument in addition to the ones you have just made argument on entitled Motion to Quash as opposed to Defendant's Motion to Quash, which appears to the Court to go off on a Thompson

issue. Do you care to make argument?

MR. DOWELL: Your Honor, I think the motion speaks for itself. Basically, I would point out to the Court that the indictment itself is so vague --

THE COURT: I said Thompson; I mean Thomas issue.

MR. DOWELL: My prior was corrected to the statute.

THE COURT: Yes, sir. I understand.

MR. DOWELL: This is directed to the instant indictment because it fails to give the defendant fair notice of what he is being charged with. It alleges that the defendant while in the course of committing and attempting to commit the robbery of Mary D. Berry, and then robbery can be committed in several different ways. We are not told how the State intends to prove.

THE COURT: That's what I meant by the Thomas issue. I understand what you are getting at.

MR. DONELL: Fine. I think you will understand, and I will rest on that motion and let it speak for itself.

THE COURT: Anything from the State on any of the three motions?

MR. ROYCE: No, Your Honor.

THE COURT: The Motion to Hold Article 37.07-1 unconstitutional, Defendant's Motion to Quash the indictment and Motion to Quash the indictment are denied.

MR. DOWELL: Your Honor, to which we except and we would respectfully request the judge to mark your ruling in the appropriate place.

THE COURT: All right. I will do so.

MR. DOWELL: Thank you, ma'am.

THE COURT: Yes, sir. But I comment, Mr. Dowell, a very well prepared argument, sir.

MR. DOWELL: Thank you, ma'am.

THE COURT: All right. Mr. Dowell, I have placed my rulings on the motions.

Now then, other motions that are here. We, of course, still have the argument on your Motion to Suppress the confession on the Jackson-Denno. Additionally, there is a Motion to Suppress certain evidence, one which is the statement, and then there is credit cards over items. Do either of you intend to present any